

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

AF HOLDINGS LLC,	)	Civil No. 12cv01525 LAB(RBB)
	)	
Plaintiff,	)	<b>ORDER GRANTING PLAINTIFF'S</b>
	)	<b>RENEWED EX PARTE APPLICATION</b>
v.	)	<b>FOR LEAVE TO TAKE EXPEDITED</b>
	)	<b>DISCOVERY [ECF NO. 5]</b>
JOHN DOE,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff's "Renewed Ex Parte Application for Leave to Take Expedited Discovery" was filed on August 13, 2012 [ECF No. 5]. Because no Defendant has been named or served, no opposition or reply briefs have been filed. For the reasons discussed below, the Renewed Ex Parte Application is **GRANTED**.

**I. PROCEDURAL HISTORY**

On June 20, 2012, Plaintiff AF Holdings, LLC ("AF Holdings") filed a Complaint with attachments [ECF No. 1]. The Plaintiff asserts copyright infringement claims against John Doe ("Defendant"). (Compl. 7-10, ECF No. 1.) Defendant allegedly copied and distributed a video that AF Holdings purports to be the registered owner of, and hold the exclusive rights to. (Id. at 1-

2.) First, the Plaintiff alleges a claim for direct copyright infringement, stating that on May 23, 2012, Defendant reproduced and distributed the copyrighted video through the Internet without Plaintiff's authorization. (Id. at 1, 7.) Second, AF Holdings pleads contributory copyright infringement, asserting that Defendant illegally obtained the video and assisted others in doing the same. (Id. at 1, 7-8.) Third, Plaintiff contends Defendant was negligent in failing to adequately secure his or her Internet access to prevent its unlawful use by others. (Id. at 9.)

Eight days after filing the Complaint, on June 28, 2012, AF Holdings filed an "Ex Parte Application for Leave to Take Expedited Discovery." (Pl.'s Ex Parte Appl. 1, ECF No. 3.) The Plaintiff sought permission to take "early discovery" from the Doe Defendant's Internet Service Provider ("ISP"), Cox Communications, to ascertain the Defendant's identity. (Id. at 1-2; see id. Attach. #1 Decl. Hansmeier 10 ("Plaintiff needs early discovery from the ISPs, so that the name and address of the accused infringer can be obtained by Plaintiff . . . .").)

The "Ex Parte Application for Leave to Take Expedited Discovery" was denied on July 25, 2012 [ECF No. 4]. The Court determined that emergency consideration was not necessary because Cox Communications maintains subscriber information for three years. (Order Den. Pl.'s Ex Parte Appl. 4, ECF No. 4.) The Court also held that AF Holdings failed to discuss whether its request was a proper subject for ex parte consideration. (Id. at 3.)

On August 13, 2012, Plaintiff filed a "Renewed Ex Parte Application for Leave to Take Expedited Discovery" [ECF No. 5]. There, AF Holdings argues that its original ex parte application

1 seeking expedited discovery was proper and that the "IP assignment  
2 logs" it seeks will be destroyed within six months. (Pl.'s Renewed  
3 Ex Parte Appl. 2-3, ECF No. 5.) The Court finds that this document  
4 is more properly construed as an application for reconsideration of  
5 the Court's July 25, 2012 "Order Denying Plaintiff's Ex Parte  
6 Application for Leave to Take Expedited Discovery" [ECF No. 4].

## 7 **II. APPLICATION FOR RECONSIDERATION**

8 Motions or applications for reconsideration of prior orders  
9 are brought pursuant to Civil Local Rule 7.1(i). S.D. Cal. Civ. R.  
10 7.1(i). In an application for reconsideration, a party seeking the  
11 same relief as that previously denied must set forth "(1) when and  
12 to what judge the [prior] application was made, (2) what ruling or  
13 decision or order was made thereon, and (3) what new or different  
14 facts and circumstances are claimed to exist which did not exist,  
15 or were not shown, upon such prior application." Id. at 7.1(i)(1).

16 Here, Plaintiff seeks the same relief (expedited discovery)  
17 that was previously denied. (Pl.'s Renewed Ex Parte Appl. 1, ECF  
18 No. 5; Order Den. Pl.'s Ex Parte Appl. 3, ECF No. 4.) It contends  
19 that its original ex parte application was denied by this Court  
20 because AF Holdings failed to demonstrate that its request should  
21 be considered on an ex parte basis, and because the subscriber  
22 information did not face "imminent destruction." (Pl.'s Renewed Ex  
23 Parte Appl. 1, ECF No. 5.) Accordingly, Plaintiff has provided the  
24 information required for reconsideration pursuant to subsections  
25 one and two of Local Rule 7.1(i)(1). Next, Plaintiff must prove  
26 that new or different circumstances merit reconsideration of the  
27 Court's ruling.

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1 **A. "New or Different Facts and Circumstances"**

2 **1. Whether the application was a proper subject for ex parte**  
3 **consideration**

4 AF Holdings maintains that its original application was  
5 properly designated as "ex parte" because Defendant's identity is  
6 unknown, and he therefore cannot be put on notice of the  
7 application. (Id. at 2.) Currently, Defendant is only known by  
8 his IP address. (Id.) "The only way Plaintiff can ascertain the  
9 Defendant's identity is to issue a subpoena to Defendant's Internet  
10 Service Provider, which is the sole entity that is in possession of  
11 Defendant's identifying information." (Id.) Plaintiff concludes  
12 that because there is no known party to oppose the application, ex  
13 parte relief is appropriate. (Id.)

14 In the Order Denying Plaintiff's Ex Parte Application for  
15 Leave to Take Expedited Discovery, the Court observed, "AF Holdings  
16 does not discuss whether its request is a proper subject for ex  
17 parte consideration or why the regular noticed motion procedures  
18 must be bypassed." (Order Den. Pl.'s Ex Parte Application for  
19 Leave 3, ECF No. 4.) In Plaintiff's Renewed Ex Parte Application,  
20 AF Holdings attempts to address these shortcomings.

21 AF Holdings makes many of the same statements in its second  
22 ex parte application as it did in the first. (Compare Pl.'s Ex  
23 Parte Appl. 4, 10-11, ECF No. 3 (stating that Plaintiff cannot name  
24 or serve an unknown Defendant; AF Holdings needs the identifying  
25 information sought in its motion; and John Doe's identity is  
26 unknown); id. Attach. #1 Decl. Hansmeier 9 (stating that the only  
27 information known about John Doe is his IP address) with Pl.'s  
28 Renewed Ex Parte Appl. 2, ECF No. 5 (stating that Defendant's

1 identity is unknown; Defendant can only be identified by his IP  
2 address; Defendant cannot be put on notice or oppose the motion;  
3 and a subpoena is needed to identify the Defendant).) The thrust  
4 of Plaintiff's argument is that because it did not know the  
5 identity of John Doe, it did not believe that the Court's regular  
6 noticed motion procedure should apply. Even so, an ex parte  
7 application seeks priority over regularly scheduled motions, so the  
8 basis for granting Plaintiff that priority must be considered.

9       **2. Whether the "IP assignment logs" face imminent**  
10       **destruction**

11       Next, Plaintiff asserts that it did not misrepresent in its  
12 original application that the information it seeks faces imminent  
13 destruction. (Id. at 3.) The original ex parte application was  
14 denied on the basis that no emergency relief was required because  
15 Cox Communications maintains subscriber information for three  
16 years. (Id. (citing Order Den. Pl.'s Ex Parte Appl. 4, ECF No.  
17 4).) AF Holdings now clarifies that it seeks the "IP Assignment  
18 Logs" which Cox Communications only maintains for six months.  
19 (Pl.'s Renewed Ex Parte Appl. 3, ECF No. 5 (citing id. Ex. A).)  
20 "Several months have already passed since Plaintiff observed the  
21 Defendant's infringing conduct over his IP address." (Id. (citing  
22 Compl., ECF No. 1).) AF Holdings urges that the information it  
23 seeks is therefore "under imminent threat of destruction." (Id.)

24       As discussed in the Court's prior order, "Ex parte  
25 applications are a form of emergency relief that will only be  
26 granted upon an adequate showing of good cause or irreparable  
27 injury to the party seeking relief." Clark v. Time Warner Cable,  
28 No. CV 07-1797-VBF(RCx), 2007 U.S. Dist. LEXIS 100716, at \*2 (C.D.

1 Cal. May 3, 2007) (citing Mission Power Eng'g Co. v. Cont'l Cas.  
2 Co., 883 F. Supp. 488, 492 (C.D. Cal. 1995)). The moving party  
3 must be "without fault" in creating the need for ex parte relief or  
4 establish that the "crisis [necessitating the ex parte application]  
5 occurred as a result of excusable neglect." Id. An ex parte  
6 application seeks to bypass the regular noticed motion procedure;  
7 consequently, the party requesting ex parte relief must establish a  
8 basis for giving the application preference. See id. United  
9 States District Court Southern District of California Civil Local  
10 Rule 7.1(e) outlines the procedures for filing regular motions.  
11 Kashani v. Adams, No. 08cv0268 JM(AJB), 2009 U.S. Dist. LEXIS  
12 34153, at \*4 (S.D. Cal. Apr. 21, 2009) (citing S.D. Cal. Civ. R.  
13 7.1(e)). Ex parte proceedings are reserved for emergency  
14 circumstances. Id.

15 Plaintiff essentially argues that new or different facts and  
16 circumstances exist because the relevant information will be  
17 destroyed in six months rather than three years. (Pl.'s Renewed Ex  
18 Parte Appl. 3, ECF No. 5.) It alleges that Defendant John Doe  
19 illegally downloaded Plaintiff's video on May 23, 2012. (See  
20 Compl. 6, ECF No. 1.) Because the Internet Service Provider  
21 maintains Internet Protocol address log files for 180 days, AF  
22 Holdings satisfies the standard for ex parte relief. See Clark,  
23 2007 U.S. Dist. LEXIS 100716, at \*2; see also Mission Power Eng'g  
24 Co., 883 F. Supp. at 492 ("In other words, [the ex parte  
25 application] must show why the moving party should be allowed to go  
26 to the head of the line in front of all other litigants and receive  
27 special treatment.") Ordinarily, six months is adequate time for a  
28 noticed motion to be briefed and ruled upon. "'Ex parte


1 applications are not intended to save the day for parties who have  
2 failed to present requests when they should have . . . ." Mission  
3 Power Eng'g Co., 883 F. Supp. at 493 (quoting In re Intermagnetics  
4 Am. Inc., 101 B.R. 191, 193 (C.D. Cal. 1989)). Nevertheless,  
5 Plaintiff's missteps can be attributed to excusable neglect. See  
6 Clark, 2007 U.S. Dist. LEXIS 100716, at 2. Accordingly, the  
7 request for leave to take expedited discovery will be granted.

### 8 III. CONCLUSION

9 AF Holdings has adequately demonstrated that "new or different  
10 facts and circumstances" merit reconsideration of the Court's  
11 "Order Denying Plaintiff's Ex Parte Application for Leave to Take  
12 Expedited Discovery" [ECF No. 4]. Plaintiff's "Renewed Ex Parte  
13 Application for Leave to Take Expedited Discovery" [ECF No. 5] is  
14 therefore **GRANTED**. It is granted leave to serve a subpoena on  
15 Defendant John Doe's Internet Service Provider to obtain the  
16 subscriber's name, address, length of service, and telephone number  
17 associated with IP address 68.105.113.37 on May 23, 2012.

18 IT IS SO ORDERED.

19  
20 Dated: October 23, 2012

  
21 RUBEN B. BROOKS  
United States Magistrate Judge

22 cc: Judge Burns  
23 All Parties of Record  
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